SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 64

LIBSON SHOPS, INC., PETITIONER,

vs.

GUSTAVE F. KOEHLER, DISTRICT DIRECTOR OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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[fol. 1] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI

Civil Action No. 9722 (2)

LIBSON SHOPS, INC., A CORPORATION, Plaintiff

v.

GUSTAVE F. KOEHLER, Defendant

COMPLAINT—Filed April 2, 1954

Comes now the plaintiff and for its cause of action against defendant states:

1. Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, with its principal office at 1209 Washington Avenue, St. Louis 3, Missouri.

2. The defendant is the District Director of Internal Revenue for the District of St. Louis, Missouri, having taken office as such on or about November 18, 1952, and is a resident of the Eastern Division of the Eastern Judicial District of Missouri.

3. This is an action to recover the sum of $12,988.84 in federal income taxes and interest thereon erroneously collected by defendant, together with interest on said sum from the date of payment thereof. It arises under the Internal Revenue Code of 1939, as amended, Title 26, United States Code, and this court has jurisdiction thereof under Title 28, Section 1340 of the United States Code.

4. On or about October 15, 1950 the plaintiff filed its federal income tax return for its taxable year ending July 31, 1950 with the Collector of Internal Revenue for the First District of Missouri, and paid the amount of tax shown to be due according to the return so filed.

5. Under date of April 1, 1952, the Internal Revenue Agent in Charge, St. Louis, Missouri, mailed to the plaintiff notice of a proposed deficiency in federal income tax for the plaintiff's taxable year ending July 31, 1950, in

the amount of $12,589.86. Subsequently the alleged deficiency was reduced to $12,392.83.

[fol. 2] 6. Said alleged deficiency in tax resulted from the disallowance by the Commissioner of Internal Revenue of certain deductions from gross income taken by the plaintiff in computing its net income in its said return for its taxable year ending July 1, 1950, to-wit: (a) $22,432.76 deducted as a net operating loss under Sections 23 (s) and 122 (b) (2) (C) of the Internal Revenue Code of 1939, as amended; and (b) $2,873.61 deducted as ordinary and necessary business expenses under Section 23 (a) (1) of the Code.

7. The relevant facts with respect to said deduction in the amount of $22,432.76 are as follows:

(a) The corporations listed below were each duly incorporated under the laws of the states and on the dates indicated:

Name	State of Incorporation	Date of Incorporation
Libson Shops Management Corporation	Missouri	January 2, 1946
Grand Libson Shops, Inc.	Missouri	January 2, 1946
Washington Libson Shops, Inc.	Missouri	January 2, 1946
Cape Girardeau Libson Shops, Inc.	Missouri	January 2, 1946
Arcade Libson Shops, Inc.	Missouri	January 2, 1946
Olive Libson Shops, Inc.	Missouri	January 2, 1946
Columbia Libson Shops, Inc.	Missouri	January 2, 1946
Maplewood Libson Shops, Inc.	Missouri	January 2, 1946
University City Libson Shops, Inc.	Missouri	January 2, 1946
Wellston Libson Shops, Inc.	Missouri	January 2, 1946
Cherokee Libson Shops, Inc.	Missouri	January 2, 1946
Gravois Libson Shops, Inc.	Missouri	January 8, 1946
Belleville Libson Shops, Inc.	Illinois	January 2, 1946
Oak Park Libson Shops, Inc.	Illinois	January 2, 1946
Evanston Libson Shops, Inc.	Illinois	January 2, 1946
Lawrence Libson Shops, Inc.	Illinois	January 2, 1946
Hampton Libson Shops, Inc.	Missouri	May 28, 1948

[fol. 3] (b) After their incorporation and prior to August 1, 1949, all of the issued and outstanding capital stock of each of said corporations except the said Hampton Libson Shops, Inc. was owned by eight individual stockholders. After its incorporation and prior to August 1, 1949, all of the issued and outstanding capital stock of Hampton Libson Shops, Inc. was owned by the said Cape Girardeau Libson Shops, Inc.

(c) Each of said corporations except Libson Shops Management Corporation was formed for the purpose of engaging in the business of retail selling of women's wearing

apparel; Libson Shops Management Corporation was formed for the purpose of providing management services for each of the other said corporations.

(d) Effective August 1, 1949, the said corporations entered into a written Agreement for Statutory Merger, and thereupon merged under and in accordance with the laws of the States of Missouri and Illinois.

(e) Under said Merger Agreement, Libson Shops Management Corporation, with its name changed to Libson Shops, Inc., plaintiff herein, is the surviving corporation.

(f) Under said Agreement, the outstanding shares of the capital stock of each of the constituent corporations in said merger, including plaintiff, became shares of the capital stock of plaintiff and certificates for such shares of the capital stock of plaintiff were issued to each of the said eight individual stockholders in lieu of their certificates in the said constitutent corporations.

(g) Article Seventh of said Agreement reads in part as follows:

> "Upon this Merger becoming effective, the Surviving Corporation shall have all the rights, privileges, immunities, and powers and shall be subject to all the duties and liabilities of a corporation organized under the General and Business Corporation Act of Missouri; and all property, real, personal and mixed, and all debts due on whatever account, including subscriptions to shares, and all other choses in action, and all and every other interest of or belonging to or due to each of the corporations so merged or consolidated shall be taken and deemed to be transferred to and vested in such Surviving Corporation without further act or [fol. 4] deed; and the title to any real estate or any interest therein under the laws of Missouri vested in any of such Missouri corporations, and the title to any real estate or interest therein under the laws of Illinois vested in any of such Illinois corporations, shall not revert or be in any way impaired by reason of such merger; provided, however, that all rights of creditors and all liens upon any property of any of said Constitutent Corporations shall be preserved unimpaired, and all debts, liabilities, and duties of the respective

Constitutent Corporations shall thenceforth attach to said Surviving Corporation and may be enforced against it to the same extent as if said liabilities and duties had been incurred or contracted by it."

(h) Prior to their merger, the following of said merged corporations had sustained net operating losses for their taxable years in the amounts indicated below:

Corporation	Taxable Period	Amount
Evanston Libson Shops, Inc.	Calendar year 1948	$ 8,115.11
	January 1, 1949 to July 31, 1949	6,442.28
Lawrence Libson Shops, Inc.	January 1, 1948 to July 31, 1948	245.03
	Taxable year ended July 31, 1949	2,770.42
Hampton Libson Shops, Inc.	Taxable year ended July 31, 1949	4,879.92
Total		$22,432.76

8. The Commissioner disallowed the deduction of said net operating loss in the amount of $22,432.76. The disallowance of said deduction was erroneous.

9. The relevant facts with respect to said deduction in the amount of $2,873.61 are as follows:

(a) Of said amount of $2,873.61, $2,500 represented legal fees paid by the plaintiff on or about August 10, 1949, to the firm of Lowenhaupt, Waite, Chasnoff & Stolar for services hereafter described, and $195.56 represented taxes and fees in the nature of taxes paid by the plaintiff on various dates in July and August, 1949, to the Secretaries of State of the States of Illinois and Missouri.

[fol. 5] (b) Of said $2,500 amount paid to Lowenhaupt, Waite, Chasnoff & Stolar, $1,000 was allocable to services in effecting said merger and $1,500 was allocable to services in considering and advising upon several alternative plans for effecting the reorganization of the plaintiff and the other corporations above mentioned. In accordance with the final recommendations of its said attorneys, the plaintiff ultimately abandoned the said alternative plans of reorganization.

(c) The said taxes and the services for which said fees in the nature of taxes were charged, and the respective amounts thereof, were as follows:

Illinois

Item	Amount
Issuing license to do business	$ 35.19
Filing Articles of Merger	20.00
Filing application for amended license	20.00
Filing certified copy of Certificate of Merger	20.00
Filing report incident to Merger	1.00
Franchise tax	11.44
License fee	12.48
Certifying copy of Articles of Merger	11.15
Missouri	
Certifying copy of Certificate of Incorporation, Articles of Incorporation, and Certificate of Authority to do Business	6.90
Filing Merger Agreement	3.00
Tax on Increase in Capital Stock	25.00
Certifying copies of Certificate of Merger and Merger Agreement	29.40
Total Illinois and Missouri	$195.56

10. The Commissioner disallowed the said deductions in the amount of $2,873.61. Of the amount paid to Lowenhaupt, Waite, Chasnoff & Stolar, $1,500 was ordinary and necessary expense, deductible as such, and the amount of $195.56 above mentioned was taxes paid and ordinary and [fol. 6] necessary expense, deductible as such. The disallowance of the said deductions was erroneous.

11. On June 5, 1953, pursuant to the defendants' notice and demand for payment, the plaintiff paid to the defendant the sum of $13,288.85, representing said alleged deficiency in tax for the year ending July 31, 1950, in the amount of $12,392.83, and interest thereon in the amount of $896.02.

12. On August 13, 1953, the plaintiff filed with the defendant a claim for a refund in the amount of (a) $12,988.84, of which $12,113.05 was claimed as the refundable portion of the alleged deficiency in tax theretofore paid and $875.79 was claimed as the refundable portion of the interest paid thereon, or (b) such greater amount as might be legally refundable, with interest in either case. A copy of said claim is hereto attached, marked "Exhibit A," and by reference made a part hereof.

13. Under date of March 16, 1954, the District Director of Internal Revenue mailed to the plaintiff notice of the disallowance of the plaintiff's said claim for refund in its entirety.

14. The disallowance of the plaintiff's said claim for refund was erroneous.

Wherefore, plaintiff prays judgment against the defendant in the amount of $12,988.84, together with interest thereon as allowed by law, and costs, and for such other and further relief as to the Court may seem just.

Abraham Lowenhaupt, William R. MacGreevy, Owen T. Armstrong, Attorneys for Plaintiff, 408 Olive Street, St. Louis 2, Mo.

Of Counsel: Lowenhaupt, Waite, Chasnoff & Stolar, 408 Olive Street, St. Louis 2, Missouri.

[fol. 7] Exhibit A.—Claim of Libson Shops, Inc., for Refund.

Form 848
U. S. Treasury Department
Internal Revenue Service
(Revised June 1951)

Claim Recorded

Claim
To Be Filed With the Collector Where Assessment Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form.

[ ] Refund of Taxes Illegally, Erroneously, or Excessively Collected.
[ ] Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
[ ] Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

Collector's Stamp
(Date received)
Received
Aug. 13 1953
43 Dir. Int. Rev.
St. Louis

Mar '51—
410003

Name of taxpayer or
(Type) purchaser of stamps: Libson Shops, Inc.
(or) Street address: 1209 Washington Blvd.
(Print) City, postal zone number, and State: St. Louis 3, Missouri.

1. District in which return (if any) was filed: First District of Missouri.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from: Aug. 1, 1949, to July 31, 1950.

3. Kind of tax: Income Tax (Normal Tax and Surtax).

4. Amount of assessment, $13,288.25; dates of payment, June 5, 1953.

5. Date stamps were purchased from the Government:

[fol. 8] 6. Amount to be refunded: Income Tax $12,113.05 & interest $875.79 $12,988.84*

7. Amount to be abated (not applicable to income, estate, or gift taxes) $

The claimant believes that this claim should be allowed for the following reasons:

See following riders attached hereto and made a part hereof:

Rider "A": Statement of Facts and Grounds Upon Which Refund is Claimed.

Rider "B": Schedule of Computation of Amount of Refund.

(Attach letter-size sheets if space is not sufficient)

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Signed Libson Shops, Inc., By H. E. Lieberman,
H. E. Lieberman, President.

Dated Aug. 11, 1953

(See Instructions on Other Side)

* or such greater amount as may be legally refundable, with interest.

Rider "A"

Statement of Facts and Grounds
Upon Which Refund Is Claimed

The Internal Revenue Agent in Charge, St. Louis, Missouri, by letter dated April 1, 1952, advised taxpayer of a proposed deficiency in income tax for the year in question in the amount of $12,589.86. Subsequently the Assistant District Commissioner of Internal Revenue, by letter dated May 12, 1953, corrected the statement of the proposed deficiency by reducing the amount thereof to $12,392.83. Said deficiency was attributable to the disallowance of certain deductions comprised in part of the following items:

1. *$22,432.76.* On August 1, 1949, the following related corporations merged in accordance with and under the statutes of the State of Missouri:

[fol. 9] Libson Shops Management Corporation.
Grand Libson Shops, Inc.
Washington Libson Shops, Inc.
Cape Girardeau Libson Shops, Inc.
Arcade Libson Shops, Inc.
Olive Libson Shops, Inc.
Columbia Libson Shops, Inc.
Maplewood Libson Shops, Inc.
University City Libson Shops, Inc.
Wellston Libson Shops, Inc.
Cherokee Libson Shops, Inc.
Gravois Libson Shops, Inc.
Belleville Libson Shops, Inc.
Oak Park Libson Shops, Inc.
Evanston Libson Shops, Inc.
Lawrence Libson Shops, Inc.
Hampton Libson Shops, Inc.

Pursuant to the terms of the merger agreement, Libson Shops Management Corporation, with its name changed to Libson Shops, Inc., was the surviving corporation. Prior to the merger the following of said merged corporations had sustained net operating losses for the periods and in the amounts indicated as follows:

Corporation	Taxable Period	Amount
Evanston Libson Shops, Inc.	Calendar year 1948	$ 8,115 11
	January 1, 1949 to July 31, 1949	6,422 28
Lawrence Libson Shops, Inc.	January 1, 1948 to July 31, 1948	245 03
	Taxable year ended July 31, 1949	2,770 12
Hampton Libson Shops, Inc.	Taxable year ended July 31, 1949	4,879 92
Total		$22,432 76

Said total amount of $22,432.76 is a net operating loss of the taxpayer deductible under Sections 23(s) and 122 (b) (2) (C) of the Internal Revenue Code. *Stanton Brewery* v. *Commissioner of Internal Revenue*, 176 F. (2d) 573.

[fol. 10] 2. *$1,500.00.* During the taxable year in question the taxpayer paid legal fees in the aggregate amount of $2500 to the firm of Lowenhaupt, Waite, Chasnoff & Stolar, St. Louis Missouri, for services in connection with said statutory merger. Of this amount, $1500 was allocable to services in considering various alternative plans for effecting the reorganization of taxpayer and the other related corporations listed above, which alternative plans were rejected by taxpayer in accordance with the final recommendations of said counsel. The $1500 amount is an ordinary and necessary business expense deductible under Section 23 (a) (1) of the Internal Revenue Code. *Sibley, Landsay & Curr Co.*, 15 T. C. 106, acq. 1951—1 C. B. 3.

3. *$195.56.* Also during the taxable year in question and in connection with the said merger, taxpayer paid taxes and fees in the nature of taxes to the Secretaries of State of the States of Illinois and Missouri, as follows:

Item	Amount
Illinois	
Issuing license to do business	$ 35 19
Filing Articles of Merger	20 00
Filing application for amended license	20 00
Filing certified copy of Certificate of Merger	20 00
Filing report incident to merger	1 00
Franchise tax	11 44
License fee	12 48
Certified copy of Articles of Merger	11 15
Missouri	
Certified copy of Certificate of Incorporation, Articles of Incorporation, and Certificate of Authority to do Business	6 90
Filing Merger Agreement	3 00
Increase in Capital Stock	25 00
Certified copies of Certificate of Merger and Merger Agreement	29 40
Total Illinois and Missouri	$195 56

[fol. 11] The amount of $195.56 comprised taxes deductible under Section 23 (c) of the Internal Revenue Code. *Borg & Beck Company*, 24 B. T. A. 995.

Rider "B"

Schedule of Computation of Amount of Refund

Net income per return	$24,361.94	
Plus: deduction properly disallowed organization expense	1,178.05	$25,539.99
Less: additional contributions reported and now deductible as within 5% limitation		58.90
Corrected net income		$25,481.09

Tax Computation

Net income as corrected		$25,481.09
Less: dividends received credit 85% of $12.50		10.63
Balance		$25,470.46
Less: Net long-term capital gain		730.96
		$24,739.50

1949 Rates

Normal tax on $20,000.00	$ 3,300.00
Normal tax on $ 4,739.50 at 19%	900.51
Surtax on $24,739.50 at 6%	1,484.37
Partial Tax	$ 5,684.88
Add: 25% of $730.96	182.74
Tax at 1949 rates	$ 5,867.62

[fol. 12]

1950 Rates		
Normal tax on $24,739.50 at 25%	$ 6,184.88	
Add: 25% of $730.96	182.74	
Tax at 1950 rates	$ 6,367.62	
Proration of Taxes		
334/365 × $5,867.62	$ 5,369.27	
31/365 × $6,367.62	540.81	
Total Income Tax Liability	$ 5,910.08	
Refund Computation		
Income Tax Assessed:		
Original, Account No. Mar.-410003-1951	$ 5,632.97	
Abatement, April 18, 1951	2.67	
	$ 5,630.30	
Alleged deficiency assessed and paid June 5, 1953	12,392.83	
Total Income Tax and alleged deficiency paid	$18,023.13	
Less: Income Tax Liability	5,910.08	
Income Tax Refundable		$12,113.05
Interest on alleged deficiency paid June 5, 1953	$ 896.02	
Portion of interest attributable to refundable portion of alleged deficiency		
$\frac{12,113.05}{12,392.83} \times 896.02 =$		875.79
Total Income Tax and Interest Refundable		$12,988.84

[fol. 13] IN UNITED STATES DISTRICT COURT

[File endorsement omitted]

ANSWER—Filed June 2, 1954

Defendant, for its answer to the complaint filed herein:

1. Denies knowledge or information sufficient to form a belief with respect to the allegations contained in Paragraph 1, which allegations accordingly are denied.

2. Admits the allegations contained in Paragraph 2.

3. Admits the allegations contained in Paragraph 3, except for the allegation that the taxes and interest were erroneously collected, which allegation is denied.

4. Admits the allegations contained in Paragraph 4, except for the allegation that the tax was paid on October 15, which allegation is denied.

5. Admits the allegations contained in Paragraph 5.

6. Admits the alleged deficiency in tax resulted, in part, from the disallowance by the Commissioner of Internal Revenue of certain deductions from gross income taken by plaintiff in computing its net income on its return for the taxable year ending July 31, 1950, and admits that $22,432.76 was deducted as a claimed net operating loss under Sections 23 (s) and 122 (b) (2) (C) of the Internal Revenue Code and that $2,873.61 was deducted as claimed ordinary and necessary business expenses under Section 23 (a) (1) of the Code. The remaining allegations contained in Paragraph 6 are denied.

7. Denies knowledge or information sufficient to form a belief with respect to the allegations contained in Paragraph 7, which allegations accordingly are denied.

8. Admits the allegations contained in the first sentence of Paragraph 8. The remaining allegations contained in that paragraph are denied.

9. Denies knowledge or information sufficient to form a belief with respect to the allegations contained in Paragraph 9, which allegations accordingly are denied.

10. Admits the allegations contained in the first sentence of Paragraph 10. The remaining allegations contained in that paragraph are denied.

[fol. 14] 11. Admits the allegations contained in Paragraph 11, except for the allegation that payment was made on June 5, 1953, which allegation is denied.

12. Admits the allegations contained in the first sentence of Paragraph 12, and admits that Exhibit A, attached to the complaint, is a true and accurate copy of the claim for refund filed by plaintiff. The remaining allegations contained in that paragraph, including every statement and allegation in the claim for refund not specifically admitted herein, are denied.

13. Admits the allegations contained in Paragraph 13.

14. Denies the allegations contained in Paragraph 14.

Wherefore, defendant prays that the complaint be dismissed, with costs assessed against the plaintiff.

Harry Richards, United States Attorney, Attorney for the Defendant, Robert E. Brauer, Assistant United States Attorney.

Copy of the above and foregoing Answer mailed this 2nd day of June, 1954, to Lowenhaupt, Waite, Chasnoff & Stolar, 408 Olive Street, St. Louis 2, Missouri, attorneys for plaintiff.

Robert E. Brauer, Assistant United States Attorney.

IN UNITED STATES DISTRICT COURT

[File endorsement omitted]

STIPULATION OF FACTS—Filed January 3, 1955

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that for the purpose of this action the following facts shall be taken as true; provided, however, that this stipulation shall be without prejudice to the rights of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true; provided, further, that the parties hereto expressly reserve the right to [fol. 15] object to the introduction of evidence on the grounds of irrelevancy and immateriality of any facts contained herein.

1. The plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, with its principal office at 1209 Washington Avenue, St. Louis 3, Missouri.

2. The defendant is the District Director of Internal Revenue for the District of St. Louis, Missouri. He took said office on or about November 18, 1952, and he is a resident of the Eastern Division of the Eastern Judicial District of Missouri.

3. This is an action to recover the sum of $12,988.84 in federal income taxes and interest thereon alleged by plaintiff to have been overpaid for the fiscal year ended July 31, 1950. The jurisdiction of this Court is invoked under the Internal Revenue Code of 1939, as amended, Title 26, United States Code, and under Title 28, Section 1340 of the United States Code.

4. On or about October 14, 1950, the plaintiff filed its

federal income tax return for its fiscal year ended July 31, 1950, with the Collector of Internal Revenue for the First District of Missouri, and thereafter paid the amount of tax reported thereon as due.

5. The Commissioner of Internal Revenue on May 21, 1953, timely assessed against plaintiff a deficiency in tax for the fiscal year ended July 31, 1950 in the amount of $12,392.83 plus interest thereon in the amount of $896.02. This sum of $13,288.85 was paid by plaintiff to the defendant on June 6, 1953.

6. This deficiency in tax resulted in part from the disallowance of certain deductions from gross income taken by plaintiff in computing its net income in its federal income tax return for the taxable year ended July 31, 1950. The deductions disallowed were (a) the sum of $22,432.76 deducted as a net operating loss under Sections 23 (a) and 122 (b) (2) (C) of the Internal Revenue Code of 1939, as amended and (b) the sum of $2,873.61 deducted as ordinary and necessary business expenses under Section 23 (a) (1) of the Code.

[fol. 16] 7. Immediately prior to August 1, 1949 there were in existence the seventeen corporations listed below, each having been duly incorporated under the laws of the states and on the dates indicated:

Name	State of Incorporation	Date of Incorporation
Libson Shops Management Corporation	Missouri	Jan. 2, 1946
Grand Libson Shops, Inc.	Missouri	Jan. 2, 1946
Washington Libson Shops, Inc.	Missouri	Jan. 2, 1946
Cape Girardeau Libson Shops, Inc.	Missouri	Jan. 2, 1946
Arcade Libson Shops, Inc.	Missouri	Jan. 2, 1946
Olive Libson Shops, Inc.	Missouri	Jan. 2, 1946
Columbia Libson Shops, Inc.	Missouri	Jan. 2, 1946
Maplewood Libson Shops, Inc.	Missouri	Jan. 2, 1946
University City Libson Shops, Inc.	Missouri	Jan. 2, 1946
Wellston Libson Shops, Inc.	Missouri	Jan. 2, 1946
Cherokee Lisbon Shops, Inc.	Missouri	Jan. 2, 1946
Gravois Libson Shops, Inc.	Missouri	Jan. 2, 1946
Belleville Libson Shops, Inc.	Illinois	Jan. 2, 1946
Oak Park Libson Shops, Inc.	Illinois	Jan. 2, 1946
Evanston Libson Shops, Inc.	Illinois	Jan. 2, 1946
Lawrence Libson Shops, Inc.	Illinois	Jan. 2, 1946
Hampton Libson Shops, Inc.	Missouri	May 28, 1948

8. Each of these corporations, except Libson Shops Management Corporation, engaged in the business of retail selling of women's wearing apparel. Libson Shops Management Corporation engaged in the business of provid-

ing management services for the other corporations. The charter of Libson Shops Management Corporation also authorized it to engage in the business of retail selling of women's apparel, but it did not so engage.

9. On July 28, 1949 each of the corporations named in paragraph 7, pursuant to due authorization and approval by their respective Boards of Directors and stockholders, [fol. 17] duly executed an Agreement For Statutory Merger. A true and correct conformed copy of this Agreement For Statutory Merger is attached hereto as Exhibit 1.

10. On August 1, 1949, the corporations filed this Agreement For Statutory Merger in the office of the Secretary of State of the State of Missouri and the Secretary issued a Certificate of Merger and Amendment pursuant to the provisions of Section 67 of "The General and Business Corporation Law of Missouri." A true and correct copy of this Certificate of Merger and Amendment is attached hereto as Exhibit 2.

11. On August 1, 1949, the corporations executed Articles of Merger and filed these Articles in the office of the Secretary of State of the State of Illinois. The Secretary issued a Certificate of Merger pursuant to the provisions of Sections 69 (a) and 66 of "The Business Corporation Act" of the State of Illinois. A true and correct copy of this Certificate of Merger is attached hereto as Exhibit 3.

12. Certified copies of said Certificates were filed for record with the appropriate public official in each city or county within which were located the registered offices of the various corporations named in Paragraph 7.

13. After their incorporation and prior to August 1, 1949, all of the issued and outstanding capital stock of each of said corporations, except the said Hampton Libson Shops, Inc., was owned by the same eight stockholders, to-wit: H. E. Lieberman, Sidney M. Dawidoff, B. Lieberman, Dorothy Lieberman, Hanna Dawidoff and Tillie Lieberman, each owning 14.05%, and Abe Lieberman and Ada Lieberman, each owning 7.85% of the stock of said corporations. After its incorporation and prior to August 1, 1949, all of the issued and outstanding capital stock of Hampton Libson Shops, Inc., was owned by the said Cape Girardeau Libson Shops, Inc.

Following the issuance of said Certificate of Merger and Amendment and said Certificate of Merger, in lieu of all outstanding stock of the constitutent corporations in said merger, including the plaintiff, there were issued to the said eight individual stockholders thereof shares of the [fol. 18] capital stock of the plaintiff in the respective numbers set forth on page 7 of said Agreement For Statutory Merger, and all other action described in Article Third: I. of said Agreement For Statutory Merger was carried out just as set forth therein.

14. Prior to August 1, 1949, Evanston Libson Shops, Inc. has filed its federal income tax returns on a calendar year basis. For the calendar year 1948, this corporation sustained a net operating loss in the amount of $8,115.11 and for the tax period begun January 1, 1949 and ended July 31, 1949, it sustained a net operating loss of $6,422.28.

15. Prior to August 1, 1949, Lawrence Libson Shops, Inc. had filed its federal income tax returns on a calendar year basis through 1947 and it thereafter filed its returns on the basis of a fiscal year ended July 31, 1948. This corporation sustained net operating losses in the amount of $1,174.47 for the calendar year 1947 and in the amount of $939.23 for the fiscal year period begun January 1, 1948 and ended July 31, 1948. All but $245.03 of these losses were carried back by this corporation to the calendar year 1946 to offset income earned by the corporation in that taxable year. This corporation sustained a further net operating loss in the amount of $2,770.42 in its fiscal year ended July 31, 1949.

16. Prior to August 1, 1949, Hampton Libson Shops, Inc. filed its federal income tax returns on the basis of a fiscal year ended July 31. This corporation sustained a net operating loss in the amount of $4,879.92 in its fiscal year ended July 31, 1949.

17. Prior to August 1, 1949, Libson Shops Management Corporation had filed its federal income tax returns on the basis of a fiscal year ended July 31.

18. Plaintiff, in its return for its fiscal year ended July 31, 1950 reported a net income, before deduction for a net operating loss carry-over, of $46,794.70. It claimed a deduction in the amount of $22,432.76 for net operating loss,

computed on the basis of unused net operating loss carry-over credits of three of the constitutent corporations in said merger from preceding tax periods as follows:

[fol. 19]

Corporation	Taxable Period	Amount
Evanston Libson Shops, Inc.	Calendar year 1948	$ 8,115.11
	Fiscal period begun Jan. 1, 1949, and ended July 31, 1949	6,422.28
Lawrence Libson Shops, Inc.	Fiscal period ended July 31, 1948	245.03
	Fiscal year ended July 31, 1949	2,770.42
Hampton Libson Shops, Inc.	Fiscal year ended July 31, 1949	4,879.92
Total		$22,432.76

19. After August 1, 1949 the palintiff maintained separate accounting records for the respective retail units theretofore operated by the separate corporations, other than Libson Shops Management Corporation, named in Paragraph 7 above. Said records show that the retail units formerly operated by the corporations listed in Paragraph 18 sustained net operating losses in plaintiff's fiscal year ended July 31, 1950, as follows:

Store	Formerly Operated by	Amount of Loss
East St. Louis, Ill.	Evanston Libson Shops, Inc.	$ 2,260.41
Lawrence, Ill.	Lawrence Libson Shops, Inc.	2,615.06
Hampton Ave., St. Louis, Mo.	Hampton Libson Shops, Inc.	6.15

20. On its tax return for the fiscal year ended July 31, 1950 plaintiff claimed deductions for ordinary and necessary business expenses in an amount that included the sum of $2,873.61. This sum had been paid by plaintiff on September 27, 1949 to Lowenhaupt, Waite, Chasnoff & Stolar, a law firm with offices in St. Louis, Missouri. Of this sum, $2,500 was paid for legal fees and $373.61 was paid to reimburse the law firm for expenses it had previously incurred on behalf of plaintiff.

21. The issues formed by the pleadings in this action include the deductibility of $1500 of said sum of $2500 and [fol. 20] the deductibility of $195.56 of said sum of $373.61. Deductibility of said sum of $195.56 is no longer an issue in this action.

22. On August 13, 1953, plaintiff duly filed a claim for refund, a true and correct copy of which is attached to the complaint in this action.

23. Under date of March 16, 1954, the Commissioner of Internal Revenue disallowed the claim for refund filed by plaintiff.

Further Stipulation.

It is stipulated that if the Court decides either or both of the two issues of this case for plaintiff, the parties will compute the amount of the judgment to be entered for plaintiff and will thereafter submit to the Court for approval the form of judgment to be entered.

Owen T. Armstrong, Attorney for Plaintiff, 408 Olive Street, St. Louis 2, Mo.

Of Counsel: Lowenhaupt, Mattingly, Chasnoff & Stolar, 408 Olive Street, St. Louis 2, Mo.

Jerome Fink, Counsel Trial Section, Tax Division, Department of Justice.

[fol. 21] Exhibit 1 to Stipulation

Agreement for Statutory Merger

of

Various Libson Corporations

into

Libson Shops, Inc.,

Formerly Libson Shops Management Corporation

(a Missouri Corporation).

Effective Date: August 1, 1949

Agreement for Statutory Merger

This Agreement for Statutory Merger (sometimes herein called "Merger Agreement") made at St. Louis, Missouri, on July 28th, 1949, by and among Libson Shops Management Corporation, a corporation duly created, organized, and existing under and by virtue of the laws of the State of Missouri and having its principal office in the City of

St. Louis, Missouri, at 1209 Washington Avenue, St. Louis 3, Missouri (hereinafter sometimes called "Surviving Corporation"), and the following corporations each duly created, organized, and existing under and by virtue of the laws of the State of Missouri: Grand Libson Shops, Inc., Gravis Libson Shops, Inc., Washington Libson Shops, Inc., Cape Girardeau Libson Shops, Inc., Arcade Libson Shops, Inc., Olive Libson Shops, Inc., Columbia Libson Shops, Inc., Maplewood Libson Shops, Inc., University City Libson Shops, Inc., Wellston Libson Shops, Inc., Cherokee Libson Shops, Inc., and Hampton Libson Shops, Inc., and the following corporations each duly created, organized and existing under and by virtue of the laws of the State of Illinois: Belleville Libson Shops, Inc., Oak Park Libson Shops, Inc., Lawrence Libson Shops, Inc., and Evanston Libson Shops, Inc. (each of which is hereinafter called a "Constituent Corporation" and together with said Surviving Corporation are called "the Constituent Corporations");

[fol. 22] Witnesseth;

That the respective parties hereto do hereby make the following recitals:

1. The Articles of Incorporation of Libson Shops Management Corporation were duly filed in the office of the Secretary of the State of Missouri on the 2nd day of January, 1946, and a Certificate of Incorporation thereon was issued by the Secretary of State on said date. Said Certificate of Incorporation showed the amount of the authorized shares of said corporation as $100,000, consisting of 500 shares of common stock of the par value of $100 per share and 500 shares of 4% cumulative preferred stock of the par value of $100 per share; that thereafter under date of January 8, 1946, a Certificate of Authority to Commence Business was duly issued to said corporation by the Secretary of State; that under date of April 19, 1946, there was filed in the office of the Secretary of State a Statement of Increase of Capital Stock increasing the authorized capital to 1,000 shares of common stock, par value $100 per share, and 500 shares of 4% cumulative preferred stock, par value $100 per share, and that on said date the Secre-

tary of State issued his Certificate of Amendment thereon; that none of said authorized preferred stock has ever been issued and that the number of shares of common stock heretofore issued and paid up and presently outstanding is 470 shares. On July 23rd, 1949, said corporation duly qualified as a foreign corporation under the Business Corporation Act of Illinois.

2. The Articles of Incorporation of each of the following corporations, to-wit: Grand Libson Shops, Inc., Washington Libson Shops, Inc., Cape Girardeau Libson Shops, Inc., Arcade Libson Shops, Inc., Olive Libson Shops, Inc., Columbia Libson Shops, Inc., Maplewood Libson Shops, Inc., University City Libson Shops, Inc., Wellston Libson Shops, Inc., and Cherokee Libson Shops, Inc., were duly filed in the office of the Secretary of State of Missouri on the 2nd day of January, 1946, and a Certificate of Incorporation was issued by the Secretary of State of Missouri to each of said corporations on the same day. On January 8, 1946, the Secretary of State of Missouri issued to [fol. 23] each of said corporations a Certificate of Authority to Commence Business.

3. The Articles of Incorporation of Gravois Libson Shops, Inc., were duly filed in the office of the Secretary of State of Missouri on the 8th day of January, 1946, and a Certificate of Incorporation was issued by the Secretary of State of Missouri on the same day. On January 17, 1946, the Secretary of State of Missouri issued to said corporation a Certificate of Authority to Commence Business.

4. The Articles of Incorporation of Hampton Libson Shops, Inc., were duly filed in the office of the Secretary of State of Missouri on the 28th day of May, 1948, and a Certificate of Incorporation was issued by the Secretary of State of Missouri on the same day. On June 4, 1948, the Secretary of State of Missouri issued to said corporation a Certificate of Authority to Commence Business.

5. Articles of Incorporation executed by the respective incorporators thereof with respect to the incorporation of each of the following corporations, to wit: Belleville Libson Shops, Inc., Oak Park Libson Shops, Inc., Evanston Libson Shops, Inc., and Lawrence Libson Shops, Inc., were

filed with the Secretary of State of Illinois on January 2, 1946, and a Certificate of Incorporation was duly issued thereon to each by the Secretary of State of the State of Illinois on the same day.

6. Each of the corporations above named was incorporated for a perpetual term and except in the case of Libson Shops Management Corporation each Certificate of Incorporation showed that the amount of the authorized shares was $50,000, consisting of 200 shares of common stock of the par value of $100 per share and 300 shares of 4% cumulative preferred stock of the par value of $100 per share, and upon incorporation each of said corporations (except as otherwise herein stated) issued 20 shares of common stock which was fully paid for. None of the authorized preferred stock of any of said corporations has ever been issued. No common stock of any of said corporations has been issued except as above set forth.

[fol. 24] 7. All of the issued and outstanding stock of each of said corporations, except stock of Hampton Libson Shops, Inc., is owned by the same eight stockholders, to-wit: H. E. Lieberman, Sidney M. Dawidoff, B. Lieberman, Dorothy Lieberman, Hanna Dawidoff and Tillie Lieberman, each owning 14.05%, and Abe Lieberman and Ada Lieberman, each owning 7.85% of the stock of each of said corporations. The issued and outstanding stock of Hampton Libson Shops, Inc., is wholly owned by Cape Girardeau Libson Shops, Inc., whose stock in turn is owned by said eight individuals in the proportions mentioned. Said eight individual stockholders constitute the Board of Directors of each of said corporations.

Now, Therefore, in consideration of the premises and of the mutual agreements, provisions, covenants and grants herein contained, the parties hereto hereby agree, according to the provisions of the General and Business Corporation Act of Missouri and also according to the Business Corporation Act of Illinois, that all of the Constituent Corporations other than Libson Shops Management Corporation shall be and are hereby merged into said Libson Shops Management Corporation, and that the terms and conditions of the merger hereby agreed upon and the mode of carrying the same into effect are as follows:

First: Libson Shops Management Corporation's corporate existence shall survive said merger and it shall continue as the surviving corporation under the name hereinafter specified. Said surviving corporation is hereinafter referred to as "Surviving Corporation" or as the "Corporation."

Second: The Certificate of Incorporation of the Surviving Corporation shall be and is hereby amended so that the following statements and provisions shall be applicable to it:

I. The name of the Corporation shall be Libson Shops, Inc.

II. The location of the principal and registered office of the Corporation in the State of Missouri is and shall be 1209 Washington Avenue, St. Louis 3, Missouri, and [fol. 25] the name of its registered agent is and shall be Sidney M. Dawidoff, whose address is the same as that of said principal and registered office.

III. The nature of the business of the Corporation and the objects and purposes to be transacted, promoted and carried on by the Corporation are as set forth in its Articles of Incorporation in Article Eighth thereof, amended to read as follows:

"Article Eighth

"The corporation is formed for the following purposes: To operate and maintain stores for the retail or wholesale sale of hosiery, women's wear and general wearing apparel; to vend, sell, buy, deal in and manufacture hosiery, women's wear and wearing apparel of every kind and description; to operate factories for the manufacture of hosiery, women's wear and wearing apparel; to apply for, acquire, own, buy, sell, assign, lease, pledge, mortgage or otherwise dispose of letters patent of the United States or of any foreign country and all of any rights, territorial or otherwise thereunder concerning hosiery, women's wear and wearing apparel, and the manufacture thereof; to apply for, acquire, hold, sell, assign, lease, mortgage or otherwise dispose of patent rights, licenses, privileges, inventions, trade-marks, trade names and pending applications therefor, relating to or useful in con-

nection with hosiery, women's wear and wearing apparel, and the manufacture thereof; to use, manufacture, or grant licenses, under any letters patent owned or controlled by the corporation, and to expend money in experimenting upon and testing the validity or value of any patent rights the corporation may acquire or propose to acquire, apply for, purchase or otherwise acquire, hold, own, use, operate, sell, assign, grant or conduct licenses in respect to any and all inventions, inmprovements and processes used in connection with or secured under letters patent of the United States or elsewhere, in connection with hosiery, women's wear and other wearing apparel, or the manufacture or sale thereof; to acquire and undertake all or any part of the business, assets, good will, prop-
[fol. 26] erty, and liabilities of any person, firm, association or corporation in connection therewith; to take, acquire, purchase, hold, own, rent, lease, sell, exchange, mortgage, improve, cultivate, develop and otherwise deal in and dispose of any and all property, real and personal of every description, incidental to or capable of being used in connection with the aforesaid businesses or any of them; to bororw money necessary for the prosecution of the business of the corporation, and to give security for the payment thereof; to lease, mortgage, plead, sell, convey or transfer such real or personal property as may be necessary for the transaction of the business of the corporation and to do all other things subsidiary, necessary or convenient for carrying out and into effect each and all of the aforesaid purposes and objects; and to do all things necessarily incident thereto.

"To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise hold and possess or otherwise dispose of shares of capital stock or any bonds, securities or evidences of indebtedness created by any other corporation or corporations of this State or any other state, county, nation or government, and while the owner of said stock to exercise all the rights and powers and privileges of ownership, including the right to vote thereon.

"To purchase, hold, sell or transfer shares of its own capital stock provided it does not use its funds or property for the purchase of its own shares of stock when such use would cause an impairment of the capital of the corporation or perpetrate a fraud upon its creditors or other stockholders, and provided further that shares of its own capital stock belonging to the corporation shall not be voted upon by the corporation.

"To supervise, manage, advise, purchase for, and otherwise handle retail stores, corporations, or other units that may deal or engage in the above said business purposes.

"The objects and purposes specified as aforesaid shall be construed both as purposes and powers and [fol. 27] shall be in no wise limited or restricted by reference or inference from the terms of any other clause in this Article, but the objects and purposes specified in each of the foregoing clauses of this Article Eighth shall be regarded as independent objects, purposes and powers, and it is hereby expressly provided that any enumeration of specific powers shall not be held to limit or restrict in any manner the powers of the Corporation as generally expressed, nor shall the Corporation be required to exercise all of its powers at any one time."

IV. The total number of shares of stock which the Corporation shall have authority to issue is twenty thousand (20,000) shares, each share being of the par value of Ten Dollars ($10.00). All of said shares shall be of one class and shall be known as "Capital Stock." Shares of Capital Stock not required to be issued pursuant to the provisions of Articles Third and Fourth hereof may be issued for such consideration, not less than the par value thereof, as the Board of Directors may from time to time determine.

V. The term of existence of the Corporation shall be perpetual.

VI. The number of Directors who shall manage the affairs of the Corporation until other provision is made shall be eight (8).

VII. The Corporation reserves the right to amend, alter,

change or repeal any provision contained in its Certificate of Incorporation as amended from time to time in the manner now or hereafter prescribed by law, and all rights conferred upon stockholders therein are granted subject to this reservation.

Third: The outstanding shares of Capital Stock of the Constituent Corporations (including the Surviving Corporation) shall be converted into shares of Capital Stock of the Surviving Corporation as follows:

I. In lieu of all outstanding stock of the Constituent Corporations, including that of the Surviving Corporation, there shall be issued to the stockholders thereof who (as heretofore stated) each own stock in each Constitutent Cor- [fol. 28] poration (except in Hampton Libson Shops, Inc., which is a wholly owned subsidiary of Cape Girardeau Libson Shops, Inc.) 16,000 shares of capital stock of the Surviving Corporation. Said 16,000 shares shall be issued as follows:

To	H. E. Lieberman	2248 shares
	Sidney M. Dawidoff	2248 "
	B. Lieberman	2248 "
	Dorothy Lieberman	2248 "
	Hanna Dawidoff	2248 "
	Tillie Lieberman	2248 "
	Abe Lieberman	1256 "
	Ada Lieberman	1256 "

i. e., in the same proportion in which said persons now hold stock, directly or indirectly, as aforesaid in each of said corporations. Certificates representing such stock shall be delivered to said persons upon surrender by them to the Surviving Corporation of all certificates presently representing all of the outstanding capital stock of all of said corporations now held by said stockholders. Certificates for shares of stock in Hampton Libson Shops, Inc., shall be surrendered to the Surviving Corporation for cancellation without issuance to Cape Girardeau Libson Shops, Inc., the owner thereof, of any stock on account of the cancellation of the stock of said Hampton Libson Shops, Inc., inasmuch as said stock is an asset of its parent, Cape Girardeau Libson Shops, Inc., whose stockholders are to

share in the stock to be issued by the Surviving Corporation.

II. Four Thousand (4,000) shares of the Capital Stock of the Surviving Corporation shall presently remain authorized but unissued.

III. The shares of Capital Stock of the Surviving Corporation issued pursuant to this Article Third shall upon such issuance be fully paid and non-assessable, inasmuch as the net worth of the Constituent Corporations is substantially in excess of the aggregate par value of such shares. To the extent that the par value of stock to be issued as aforesaid is in excess of the par value of the [fol. 29] combined capital stock of the Constituent Corporations heretofore paid up and available therefor, such excess shall be paid up by transferring from Surplus Account of the Surviving Corporation to its Capital Account the amount necessary to pay up in full the capital stock of the Surviving Corporation so to be issued, the combined surplus of the Constituent Corporations being at this time in excess of the amount required for such purpose. As of the close of business July 31, 1948, the combined outstanding and paid up capital stock and the combined surplus of the Constituent Corporations as shown by the books of the company on a consolidated basis amounted to $229,380.90 and is the same at the present time except as affected by transactions in the ordinary course of business, which as a whole has been profitable and has resulted in a further increase in net worth.

IV. Upon proof satisfactory to the President and the Secretary (or, in their absence or disability, a Vice-President or Assistant Secretary, respectively) of the Surviving Corporation that any stock certificate otherwise required to be surrendered has been lost, stolen, or destroyed, and upon due application in writing by the person entitled thereto and the giving of an indemnity bond, satisfactory to the Treasurer of the Surviving Corporation, as to surety and conditions, the proper officers of the Surviving Corporation are authorized to cause a certificate or certificates representing the appropriate number of shares of Capital Stock of the Surviving Corporation to be issued without the surrender of the stock certificates alleged to have been lost, stolen, or destroyed.

Fourth: The names and post-office addresses of the Directors of the Corporation to serve upon such merger becoming effective and until their successors shall have been duly elected and shall qualify, are as follows:

H. E. Lieberman, 19 Thorndell Drive, Richmond Heights 17, Mo.
Sidney M. Dawidoff, 7548 Oxford Drive, Clayton 5, Mo.
B. Lieberman, 7548 Oxford Drive, Clayton 5, Mo.
Abe Lieberman, 7541 Parkdale Ave., Clayton 5, Mo.
[fol. 30] Dorothy Lieberman, 19 Thorndell Drive, Richmond Heights 17, Mo.
Hanna Dawidoff, 7548 Oxford Drive, Clayton 5, Mo.
Tillie Lieberman, 7548 Oxford Drive, Clayton 5, Mo.
Ada Lieberman, 7541 Parkdale Ave., Clayton 5, Mo.

and the names of the officers of the Corporation who shall hold office until their respective successors are chosen and have duly qualified, subject, however, to removal from office at any time by the Board of Directors, are:

H. E. Lieberman	President
Sidney M. Dawidoff	Sec.-Treas.
Abe Lieberman	Vice-President
Bernard Lieberman	Vice-President.

Fifth: The By-laws of the Corporation initially shall be those heretofore adopted by the Surviving Corporation as its By-laws and in effect at the date of this Merger Agreement.

Sixth: The Merger Agreement shall be submitted to the stockholders of each of said Constituent Corporations at separate meetings thereof called for the purpose of considering the same upon notice given in a manner sufficient to satisfy the requirements of both the State of Illinois and the State of Missouri. As soon as all statutory and other requirements which are conditions precedent to this Merger Agreement becoming legally effective have been complied with, this Merger Agreement and the Merger herein contemplated shall be and become effective, but if for any reason the effective date shall be delayed beyond July 31, 1949, then upon the same becoming effective the same shall

as between the parties hereto be treated as if it had become effective at the opening of business on August 1, 1949.

Seventh: Upon this Merger becoming effective, the Surviving Corporation shall have all the rights, privileges, immunities, and powers and shall be subject to all the duties and liabilities of a corporation organized under the General and Business Corporation Act of Missouri; and [fol. 31] all property, real, personal and mixed, and all debts due on whatever account, including subscriptions to shares, and all other choses in action, and all and every other interest of or belonging to or due to each of the corporations so merged or consolidated shall be taken and deemed to be transferred to and vested in such Surviving Corporation without further act or deed; and the title to any real estate or any interest therein under the laws of Missouri vested in any of such Missouri corporations, and the title to any real estate or interest therein under the laws of Illinois vested in any of such Illinois corporations, shall not revert or be in any way impaired by reason of such merger; provided, however, that all rights of creditors and all liens upon any property of any of said Constitutent Corporations shall be preserved unimpaired, and all debts, liabilities, and duties of the respective Constitutent Corporations shall thenceforth attach to said Surviving Corporation and may be enforced against it to the same extent as if said liabilities and duties had been incurred or contracted by it. If at any time the Surviving Corporation shall conclude or be advised that any further assignments, assurances in the law, or things are necessary or desirable to vest in it the title to any property of any of the Constituent Corporations, its proper officers and directors shall and will execute all proper assignments and assurances in the law and do all things necessary or proper to vest title to such property in the Surviving Corporation, and otherwise to carry out the purposes of this Agreement. If in any case a separate conveyance or other instrument of assurance of title to the Surviving Corporation of any of the assets of the Constitutent Corporations shall be required in order to conform to local applicable laws, such conveyance or instrument may be executed in the name of one or more of the Constituent Corporations as of the

date on which this Merger became effective by the respective officers of such corporations in office at that time or subsequently appointed for such purpose by the Board of Directors of the Surviving Corporation.

Eighth: Upon this merger becoming effective, the amount of all surplus reserve accounts, Capital Stock Account, Capital Surplus Account, and Earned Surplus Account of [fol. 32] each of the Constituent Corporations shall be carried forward to the books of the Surviving Corporation as its surplus reserve accounts, Capital Stock Account, Capital Surplus Account, and Earned Surplus Account respectively, except that proper adjustment shall be made to reflect changes in Capital Stock Account arising out of issuance or conversion of stock as herein elsewhere provided, so that the aggregate amount of the net assets of the merging corporations which was available for the payment of dividends immediately prior to such merger or consolidation, to the extent that the value thereof is not required to be transferred to stated capital on account of the issuance of shares or otherwise, shall continue to be available for the payment of dividends by such Surviving Corporation.

Ninth: It is agreed that upon and after the issuance of a certificate of merger by the Secretary of State of the State of Illinois:

I. The Surviving Corporation may be served with process in the State of Illinois in any proceeding for the enforcement of any obligation of any corporation organized under the laws of the State of Illinois which is a party to the merger, and in any proceeding for the enforcement of the rights of a dissenting shareholder of any such corporation organized under the laws of the State of Illinois against the Surviving Corporation;

II. The Secretary of State of the State of Illinois shall be and hereby is irrevocably appointed as the agent of the Surviving Corporation to accept service of process in any such proceeding; and

III. The Surviving Corporation will promptly pay to the dissenting shareholders of any corporation organized under the laws of the State of Illinois which is a party to the merger the amount, if any, to which they shall be entitled

under the provisions of The Business Corporation Act of the State of Illinois with respect to the rights of dissenting shareholders.

In Witness Whereof, the corporations parties hereto have each caused these presents to be executed on the day and year first above written by their respective Directors and [fol. 33] their respective corporate seals to be affixed hereto and attested by their respective Secretaries.

Libson Shops Management Corporation, Grand Libson Shops, Inc., Gravois Libson Shops, Inc., Washington Libson Shops, Inc., Cape Girardeau Libson Shops, Inc., Arcade Libson Shops, Inc., Olive Libson Shops, Inc., Columbia Libson Shops, Inc., Maplewood Libson Shops, Inc., University City Libson Shops, Inc., Wellston Libson Shops, Inc., Cherokee Libson Shops, Inc., Hampton Libson Shops, Inc., Belleville Libson Shops, Inc., Oak Park Libson Shops, Inc., Lawrence Libson Shops, Inc., Evanston Libson Shops, Inc.

Each by its Directors, said Directors of each being:

H. E. Lieberman, Sidney M. Dawidoff, B. Lieberman, Abe Lieberman, Dorothy Lieberman, Hanna Dawidoff Tillie Lieberman, Ada Lieberman.

* * * * * * *

[fol. 34] EXHIBIT 2 TO STIPULATION

State of Missouri

Certificate of Merger and Amendment

(Seal of State of Missouri)

To All to Whom These Presents Shall Come:

I, Walter H. Toberman, Secretary of State of the State of Missouri, and Keeper of the Great Seal thereof, do hereby certify that Grand Libson Shops, Inc., Gravois Libson Shops, Inc., Washington Libson Shops, Inc., Cape Girardeau Libson Shops, Inc., Arcade Libson Shops, Inc., Olive Libson Shops, Inc., Columbia Libson Shops, Inc.,

Maplewood Libson Shops, Inc., University City Libson Shops, Inc., Wellston Libson Shops, Inc., Cherokee Libson Shops, Inc., and Hampton Libson Shops, Inc., corporations organized under the Laws of Missouri, have filed in the Office of the Secretary of State their Certificate of Merger into Libson Shops Management Corporation, Survivor. The surviving corporation also amends the Articles of Incorporation as follows:

1) Change of Name to Libson Shops, Inc.;
2) Changing and Increasing authorized shares
From: 1,000 shares Common Stock par value $100.00 per share
20,000 shares Common Stock par value $100.00 per share

3) Extending business purposes

as provided by Law, and have in all respects complied with the requirements of law governing the Merger and Amendment of corporations organized under The General and Business Corporation Act of Missouri.

In Witness Whereof, I hereunto set my hand and affix the Great Seal of the State of Missouri. Done at the City of Jefferson, this 1st day of August, A. D. 1949.

Walter H. Toberman, Secretary of State. J. Paul Markway, Chief Clark. (Seal).

[fol. 35] EXHIBIT 3 TO STIPULATION

Book 1954, Page 158

Certificate Number 172

State of Illinois

Office of the Secretary of State

(Seal of State of Illinois)

To All to Whom These Presents Shall Come, Greetings:

Whereas, Articles of Merger duly signed and verified of Grand Libson Shops, Inc., Gravois Libson Shops, Inc., Washington Libson Shops, Inc., Cape Girardeau Libson

Shops, Inc., Arcade Libson Shops, Inc., Olive Libson Shops, Inc., Columbia Libson Shops, Inc., Maplewood Libson Shops, Inc., University City Libson Shops, Inc., Wellston Libson Shops, Inc., Cherokee Libson Shops, Inc., and Hampton Libson Shops, Inc. (all Missouri corporations), merged with Beleville Libson Shops, Inc., Oak Park Libson Shops, Inc., Lawrence Libson Shops, Inc. and Evanston Libson Shops, Inc. (all Illinois corporations), into Libson Shops Management Corporation (a. Missouri corporation), have been filed in the Office of the Secretary of State on the 1st day of August, A. D. 1949, as provided by "The Business Corporation Act" of Illinois, in force July 13, A. D. 1933, as amended: Now Therefore, I, Edward J. Barrett, Secretary of State of the State of Illinois, by virtue of the powers vested in me by law, do hereby issue this certificate of merger and attach thereto a copy of the Articles of Merger of the aforesaid corporation.

In Testimony Whereof, I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois. Done at the City of Springfield this 1st day of August, A. D. 1949, and of the Independence of the United States the one hundred and 74th.

Edward J. Barrett, Secretary of State. (Seal.)

MEMORANDUM—March 23, 1955

[fol. 36] IN UNITED STATES DISTRICT COURT

This is a suit for a tax refund. Two issues are presented: (1) whether a surviving corporation in a statutory merger, in computing its net income after the merger, is entitled to carry over and deduct net operating losses sustained by 3 of the 17 merged corporations, prior to the merger, under the provisions of 26 U. S. C. § 122 (b) (2) (C) (1952); and (2) whether attorney's fees for service in such a reorganization proceeding are a deductible item or must they be capitalized.

I

Findings of Fact

The first question is presented on a "Stipulation of Facts". Stipulated facts, as in paragraphs 1 to 23, are by reference here adopted.

Conclusions of Law

Plaintiff relies on the case of Stanton Brewery v. Commissioner of Internal Revenue (2d Cir.), 176 F. 2d 573, to sustain its right to a loss carry-over. This case is persuasive authority for plaintiff. There are some differences. Here we are concerned with a corporation operating-loss. In the Stanton case the Court was concerned with "unused excess profits carry-back and carry-over". The Court in the Stanton case said:

> ". . . it was considered equitable that lean years should be set off against lush ones to strike some sort of average, and hence we have the device of the 'unused excess profits credit carry-back and carry-over' from one tax year to another. Here we are interested only in the carry-over."

The loss carry-over in the present case and the excess profits carry-over in the Stanton Brewery case are for practical results the same.

Later in the Stanton opinion the Court observed that its ruling:

> [fol. 37] ". . . seems to us the one which will carry out the evident statutory purpose, since it accords the privileges of the carry-over provisions to what is essentially a continuing enterprise, entitled to all their benefits in ameliorating otherwise harsh tax consequences of fluctuating profits or expanding business."

Now we find the Stanton ruling shows signs of parting in similarity from this case. Is a merger of one holding company and one operating company, as was the Stanton record, comparable with a merger of seventeen corporations into one, as we have here? Can we, for Federal tax

purposes, call the latter "a continuing enterprise" of each of the 17 former corporations?

Minor changes by corporate reorganization are given weight in the Stanton case by this statement:

> "If there were real substance, for present purposes, to this conception of a corporate merger as a continuance of existence of the dominant corporation only, it would seem more in accord with business realities here to say that the larger and active operating business had taken over the inactive entity. It is true that upon his assumption the Commissioner may seem to avoid the dilemma of holding that a substantial tax credit is harshly destroyed by a comparatively minor change in corporate form."

Which brings us to the taxpayer's position here that the plaintiff, as the surviving corporation in a statutory merger, is essentially the same taxpayer as the merged corporation and is possessed of all their rights. This conclusion, the taxpayer says, is justified by the terms of the state statutes under which the merger was effected.

As we view the decisive question it is not whether the plaintiff, or merged corporation, is the same as the merged corporations, but is the survivor corporation the same as each of the corporations whose tax credit the merged corporation would appropriate? This question calls for examination of the corporate change effected.

Do we have a "comparatively minor change" in corporate form, as in the Stanton case? Take for example [fol. 38] Evanston Libson Shops, Inc., one of the merger corporations. It had $14,537.39 of the claimed tax reductions in suit. Can it be said that plaintiff, now taxpayer or merged corporation, is only a minor change from Evanston Libson Shops, Inc. To so hold, "minor change" would have to encompass a corporation passing from operating one store in East St. Louis, Illinois, to operating 16 other stores, the major portion of which are in another state.

The stock structure of Evanston Libson Shops, Inc., was $50,000.00 of shares having a par value of $100.00. Twenty shares were fully paid up, or $2,000.00. No further stock was ever issued. The merged corporation has 20,000 shares

of capital stock of $10.00 per share par value. Sixteen thousand shares are to be issued to the stockholders of all the 17 merged corporations. On confirmation of the merger by acceptance of the proposed charter all but plaintiff corporation ceased to exist.

There is a provision in the Articles (Third, III) for issuing the stock to the stockholders of the merged corporations without further payment:

> "III. The shares of Capital Stock of the Surviving Corporation issued pursuant to this Article Third shall upon such issuance be fully paid and non-assessable, inasmuch as the net worth of the Constituent Corporations is substantially in excess of the aggregate par value of such shares. To the extent that the par value of stock to be issued as aforesaid is in excess of the par value of the combined capital stock of the Constituent Corporations heretofore paid up and available therefor, such excess shall be paid up by transferring from Surplus Account of the Surviving Corporation to its Capital Account the amount necessary to pay up in full the capital stock of the Surviving Corporation so to be issued, the combined surplus of the Constituent Corporations being at this time in excess of the amount required for such purpose."

We conclude from this that treating the 17 corporations as one, rather than separate entities, when their financial structure was combined the fund referred to resulted. In [fol. 39] the scramble of corporations it is fair to conclude the stockholders of plaintiff received something of value, in stock holdings, and now hold it in their stock ownership of the merged corporation, which they did not hold prior to merger.

We are not informed as to the corporate powers of Evanston Libson Shops, Inc., except—"Each of these corporations, except Libson Shops Management Corporation, engaged in the business of retail selling of women's wearing apparel." Some of the powers of the plaintiff, as listed in the Articles, are:

> ". . . or otherwise dispose of letters patent of the United States or of any foreign country and all or

any rights, territorial or otherwise thereunder concerning hosiery, women's wear and wearing apparel, and the manufacture thereof; to apply for, acquire, hold, sell, assign, lease, mortgage or otherwise dispose of patent rights, licenses, privileges, inventions, trade-marks, trade names and pending applications therefor, relating to or useful in connection with hosiery, women's wear and wearing apparel, and the manufacture thereof; to use, manufacture, or grant licenses, under any letters patent owned or controlled by the corporation, and to expend money in experimenting upon and testing the validity or value of any patent rights the corporation may acquire or propose to acquire, apply for, purchase or otherwise acquire, hold, own, use, operate, sell, assign, grant or conduct licenses in respect to any and all inventions, improvements and processes used in connection with or secured under letters patent of the United States or elsewhere, in connection with hosiery, women's wear and other wearing apparel, or the manufacture or sale thereof; to acquire and undertake all or any part of the business, assets, good will, property, and liabilities of any person, firm, association or corporation in connection therewith; to take, acquire, purchase, hold, own, rent, lease, sell, exchange, mortgage, improve, cultivate, develop and otherwise deal in and dispose of any and all property, real and personal, of every description, incidental to or capable of being used in connection with the aforesaid businesses or any of [fol. 40] them; to borrow money necessary for the prosecution of the business of the corporation, and to give security for the payment thereof; to lease, mortgage, pledge, sell, convey or transfer such real or personal property as may be necessary for the transaction of the business of the corporation and to do all other things subsidiary, necessary or convenient for carrying out and into effect each and all of the aforesaid purposes and objects; and to do all things necessarily incident thereto.

"To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise ~~hold and~~ possess or otherwise dis-

pose of shares of capital stock or any bonds, securities or evidences of indebtedness created by any other corporation or corporations of this State or any other State, county, nation or government, and while the owner of said stock to exercise all the rights and powers and privileges of ownership, including the right to vote thereon.

* * * * * * *

"To supervise, manage, advise, purchase for, and otherwise handle retail stores, corporations, or other units that may deal or engage in the above said business purposes."

A further provision of the Articles of Incorporation is:

"Seventh: Upon this Merger becoming effective, the Surviving Corporation shall have all the rights, privileges, immunities, and powers and shall be subject to all the duties and liabilities of a corporation organized under the General and Business Corporation Act of Missouri; and all property, real, personal and mixed, and all debts due on whatever account, including subscriptions to shares, and all other choses in action, and all and every other interest of or belonging to or due to each of the corporations so merged or consolidated shall be taken and deemed to be transferred to and vested in such Surviving Corporation without further act or deed; * * *"

This provision, and a necessary one to carry out the purpose of the merger, has its effect on plaintiff's claim. See New Colonial Co. v. Helvering, 292 U. S. 435, l. c. 441:

[fol. 41] "But, be this as it may, we are of opinion that in law and in fact the two corporations were not identical but distinct. This was plainly implied in the transfer of the assets and business from one to the other. That transaction was voluntary and contractual, not by operation of law. Thereafter neither corporation had any control over the other; the old corporation had no interest in the assets or business, and the chance of gain and the risk of loss were wholly with the new one."

Before leaving this subject we note a further provision of the "Agreement for Statutory Merger of Various Libson Corporations." Articles First and Second provide:

> "First: Libson Shops Management Corporation's corporate existence shall survive said merger and it shall continue as the surviving corporation under the name hereinafter specified. Said surviving corporation is hereinafter referred to as 'Surviving Corporation' or as the 'Corporation.'
>
> "Second: The Certificate of Incorporation of the Surviving Corporation shall be and is hereby amended so that the following statements and provisions shall be applicable to it: * * *"

This "surviving" corporation was one of the original seventeen corporations. What its structure was at time of merger the record does not show.

The stockholders of Evanston Libson Shops, Inc., and each of the remaining sixteen corporations were the same, and each shared in the treatment of the 17 corporations as a unit rather than as individual corporation stockholders. We have listed in part some of the results. We cannot on this record hold plaintiff and any one of the corporations, having either of tax credits in issue, is the same corporation.

We have not overlooked parts of the merger agreement favorable to plaintiff's plea. For illustration:

> ". . . [the other 16 corporations] be and are hereby merged into said Libson Shops Management [fol. 42] Corporation, and that the terms and conditions of the merger hereby agreed upon and the mode of carrying the same into effect are as follows: * * *"

There is language in the laws of the state concerned with the "merger" of the 17 corporations which taken literally lend further support to plaintiff's position of "same" corporation. But the laws of the state cannot for purpose of Federal taxation determine whether the corporations are the same.

To declare in the articles of merger, or point out a similar statement in the statute to the effect that a surviving

corporation is one and the same as one of the corporations whose stockholders' rights were merged into the survivor corporation, is under the facts of this record to deal in generalities and not to come to grips with the realities of the situation. There are far too many differences between the new or survival corporation and each of the old corporations that must fail to survive, to find the corporation surviving is for tax credit purposes the same as the corporations that have ceased to exist.

We have here three corporations that had tax credit and a corporation without tax credits that took over the assets of 16 corporations subject to their liabilities. It would take intricate mathematical calculation to ascertain what part of the value, if any, of stockholders' present holdings are represented by the old holding in the corporations that had losses resulting in the tax credits. These conclusions we think important and we shall presently comment on them.

Now coming to the statute. How shall it be construed?

> "* * * Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed.
>
> "The statutes pertaining to the determination of taxable income have proceeded generally on the principle that there shall be a computation of gains and losses on the basis of a distinct accounting for each tax- [fol. 43] able year; and only in exceptional situations, clearly defined, has there been provision for an allowance for losses suffered in an earlier year. Not only so, but the statutes have disclosed a general purpose to confine allowable losses to the taxpayer sustaining them, i. e., to treat them as personal to him and not transferable to or usable by another.
>
> * * * * * * *
>
> "* * * Taken according to their natural import they mean that the taxpayer who sustained the loss is the one to whom the deduction shall be allowed. Had there been a purpose to depart from the general policy in that regard, and to make the right to the

deduction transferable or available to others than the taxpayer who sustained the loss, it is but reasonable to believe that purpose would have been clearly expressed. And as the section contains nothing which even approaches such an expression, it must be taken as not intended to make such a departure. (New Colonial Co. v. Helvering, supra, l. c. 440-441.)

The statute under which plaintiff must prevail, if at all, reads (26 U. S. C. § 122 (b) (2) (C)):

> "(C) [as added by Sec. 330, Revenue Act of 1951, c. 521, 65 Stat. 452] Loss for Taxable Year Beginning After December 31, 1947, and Before January 1, 1950. —If for any taxable year beginning after December 31, 1947, and before January 1, 1950, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-over for each of the three succeeding taxable years, except that the carry-over in the case of each such succeeding taxable year (other than the first succeeding taxable year) shall be the excess, if any, of the amount of such net operating loss over the sum of the net income for each of the intervening years * * *."

Does plaintiff come within the terms of this statute? Plaintiff's counsel argues it does because the statute, after reciting if "the taxpayer has a net operating loss," in providing it shall be a carry-over," the statute does not [fol. 44] specifically say such carry-over shall be only to the taxpayer. Therefore counsel would bring the plaintiff within the statute by reason of such absence on the basis of relationship, whatever it may be, of the 16 corporations ceasing to the one corporation surviving.

We cannot read the statute as plaintiff does. If we were in doubt we would have that doubt removed by the New Colonial case, holding tax reductions are only allowed where there is a "clear" statute so providing. Doubt as to the meaning of the statute should be dispelled by that opinion saying that statutes have disclosed a general purpose to confine allowable losses to the "taxpayer" sustain-

ing them, and "to treat them as personal to him and not transferable to or usable by another."

This statute was before Congress since the ruling in the New Colonial case. We are bound to hold that if Congress wanted to repudiate that ruling as to its policy on tax credits it would have done so in plain language. It has not done so.

The Stanton Brewery case must be considered on its own facts. It is not a parallel to this case. We have set forth several striking illustrations of departure from the facts of this case. In so far as it might bear on this record in support of plaintiff's claim, we feel bound by the New Colonial case and refuse to follow the Stanton Brewery case.

The effect of a ruling such as plaintiff seeks would be establishing a precedent susceptible of wide-spread abuse. That is if Federal courts are to consider themselves bound by state laws and merger agreements under them in tax matters. Such a rule might result in a different Federal tax status for corporations in each state. In this case plaintiff boldly attempts to take a tax loss for a corporation that has ceased to exist, and transfer it for the benefit of another corporation or corporations with tax liabilities. If it is allowable in one case, it is allowable in all. The law must operate uniformly. It cannot make fish of one and fowl of another. And so bankrupt corporations with tax credits would find themselves the object of desirable [fol. 45] purchase or "merger" by or with corporations with tax liabilities, in order that after purchase the tax credits could be used to offset taxes due, just as plaintiff would do in this case. Regardless of what the motive or motives for including the corporations with tax credits in the merger, we have no doubt that use of their tax credits was one. The corporations holding the tax credits could not use them as apparently the stipulation indicates the stores operated by the corporations having tax credits continued to lose money.

II

The claim for a deduction of $1,500.00 arises from legal fees paid to a law firm to develop, formulate and carry

out the plan by which the corporate merger was effected. The original fee charged was for——

> ". . . to services, advice and consultation and attention to statutory merger of all companies; drafting of agreement, minutes and securing certificates."

The taxpayer took a deduction for the full amount of $2,500.00. It was disallowed in full as an expense in connection with reorganization, subject to a charge as a capital expense, needed to give the taxpayer an intangible asset in its altered corporate form.

By the present claim plaintiff acknowledges the Commissioner was right to the extent of $1,000.00 and now asks only for a deductible item of $1,500.00. This on the basis that the attorneys submitted several plans for a reorganization that were not accepted and that the legal expenses should be divided accordingly.

It is evident the client had one purpose in mind: A group of stockholders owned stock in several corporations. Some of the corporations were making money. Some were losing money. All were in the same business. How can the losses of some stores be credited on the gains of other stores? The assets of the 17 corporations presented a corporation with a better balance sheet for credit rating than did either corporation separately and certainly the corporations that had losses.

[fol. 46] One of the attorneys of the firm that carried out the enterprise testified:

> "Q. As a matter of fact, there were suggestions in the conferences leading up to the final and ultimate decision, and everything suggested in those conferences, sir, was designed to figure out the best way taxwise to get these sixteen units into one, is that a correct statement, sir?
>
> A. That is right.

Even on plaintiff's theory, to divide the services dollar for dollar for the abandoned plans and the acceptable plan impresses us as a difficult achievement. On this record one of the attorneys engaged made an arbitrary division for allocating the fee charged but we heard no substantial

evidence on which to base a finding of division in fact. Plaintiff has failed to carry the burden of proof that there was or is a division in fact in the services rendered.

Let judgment dismissing the claims be settled and presented.

Rubey M. Hulen, Judge.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION:

No. 9722 (2)

LIBSON SHOPS, INC., a corporation, Plaintiff

vs.

GUSTAVE F. KOEHLER, Defendant

JUDGMENT—April 15, 1955

This cause having come on for hearing on the 3rd day of January, 1955, and the plaintiff appearing by its counsel, and the defendant appearing by his counsel, and the [fol. 47] Court having before it a stipulation of facts, and having heard the oral testimony adduced at said hearing, and having considered briefs filed by and on behalf of both of said parties, and being duly advised in the premises, it is hereby

Ordered, Adjudged and Decreed that the complaint of the plaintiff be dismissed with prejudice and at the costs of plaintiff.

Rubey M. Hulen, United States District Judge.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL.—Filed June 13, 1955

[File endorsement omitted]

Notice is hereby given that Libson Shops, Inc., plaintiff above named, hereby appeals to the United States

Court of Appeals for the Eighth Circuit from the final judgment entered in this action on April 15, 1955.

Owen T. Armstrong, Attorney for Appellant, Libson Shops, Inc., 408 Olive Street, St. Louis 2, Mo.

Of Counsel: Lowenhaupt, Mattingly, Chasnoff & Stolar.

In United States District Court

Stipulation of Contents of Record on Appeal—Filed July 7, 1955

[File endorsement omitted]

Pursuant to the Notice of Appeal heretofore filed by the plaintiff in the above cause, the parties, by their respective counsel, hereby jointly designate the following parts of the record, proceedings and evidence to be included in the record on appeal:

[fol. 48] 1. Docket entries of proceedings in the District Court.

2. Pleadings as follows:

(a) Complaint, including Exhibit A thereto.
(b) Answer.

3. Stipulation of Facts, including Exhibits 1, 2 and 3 thereto.

4. Memorandum opinion embodying findings of fact and conclusions of law and directing the entry of judgment thereon.

5. Judgment entered April 15, 1955.

6. Notice of Appeal.

7. This Stipulation of Contents of Record on Appeal.

Owen T. Armstrong, Attorney for Plaintiff-Appellant, 408 Olive Street, St. Louis 2, Mo.

Of Counsel: Lowenhaupt, Mattingly, Chasnoff & Stolar, 408 Olive Street, St. Louis 2, Missouri.

H. Brian Holland, Assistant Attorney General, Tax Division.

IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS ON APPEAL.—Filed July 7, 1955

[File endorsement omitted.]

Comes now the appellant, Libson Shops, Inc., by its attorney, and respectfully states that the point on which it intends to rely on the appeal is as follows:

The District Court erred in concluding that the appellant, as the surviving corporation in a statutory merger, in computing its net income for a taxable period commenc-[fol. 49] ing on the date of the merger, is not entitled under Sections 23 (s) and 122 (b) (2) (C) of the Internal Revenue Code of 1939 (26 U. S. C., Secs. 23 (s), 122 (b) (2) (C) (1952)), to carry over and to deduct net operating losses sustained by several of the other merged corporations in taxable periods ended prior to the date of the merger.

Owen T. Armstrong, Attorney for Plaintiff-Appellant, 408 Olive Street, St. Louis 2, Mo.
Of Counsel: Lowenhaupt, Mattingly, Chasnoff & Stolar, 408 Olive Street, St. Louis 2, Missouri.

Service of above statement acknowledged:

Dated: June 27, 1955.

H. Brian Holland, Assistant Attorney General.

IN UNITED STATES DISTRICT COURT

CLERK'S DOCKET ENTRIES.

1954-

April 2—Complaint filed and summons issued thereon to deft.

April 15—Marshal's return filed. Summons executed April 4 and April 6, 1954.

June 2—Answer of deft. to complaint filed.

July 22—Set Monday, November 22, 1954.

November 17—By agreement, order heretofore entered

1954

setting cause for trial November 22, 1954 vacated and cause reset for trial on December 17, 1954.

December 15—By agreement and by leave, order heretofore entered setting cause for trial December 17, 1954 vacated and cause reset for trial January 3rd, 1955.

[fol. 50] 1955

January 3—Parties appear and announce ready for trial; whereupon final hearing of cause before the Court is commenced, concluded and issues submitted on briefs to be simultaneously presented within twenty days, and parties granted ten days thereafter to submit answering briefs if desired.

January 6—Transcript of testimony of Abraham Lowenhaupt given at trial of cause on January 3, 1955, filed by Official Court Reporter of Court #2.

February 15—On application of pltff., time within which pltff. and deft may submit answering briefs to briefs heretofore submitted by parties, extended to and including February 28, 1955.

March 23—Memo opinion of the Court embodying findings of fact and conclusions of law, filed determining issues on final hearing and directing judgment in accordance therewith dismissing pltff's claim be settled and presented.

April 15—Judgment filed and entered dismissing complaint with prejudice and at costs of plaintiff.

April 21—Deft's verified bill of costs filed.

June 13—Pltf's notice of appeal to U. S. Court of Appeals, 8th Circuit, from final judgment entered herein April 15, 1955, together with pltff's cost bond on said appeal in the sum of $250.00 filed. Copy of such notice of appeal forthwith transmitted by Clerk to U. S. Atty., as atty. for defendant. Pltff. deposited in the Registry $250.00 cash in lieu of other surety.

July 7—Stipulation of parties as to contents of record on appeal of pltff filed. Plaintiff's statement of points on such appeal filed.

A True Copy: Certified this 19th day of July, 1955.

James J. O'Connor, Clerk, By Annice W. Kinder, Deputy Clerk.

[fol. 51] UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 15,397

LIBSON SHOPS, INC., Appellant

vs.

GUSTAVE F. KOEHLER, District Director of Internal Revenue, Appellee

Appeal from the United States District Court for the Eastern District of Missouri.

OPINION—January 19, 1956

Owen T. Armstrong (Lowenhaupt, Mattingly, Chasnoff and Stolar were with him on the brief), for Appellant.

Harry Marselli, Attorney, Department of Justice (H. Brian Holland, Assistant Attorney General, and Ellis N. Slack and Harry Baum, Attorneys, Department of Justice, and Harry Richards, United States Attorney, were on the brief), for Appellee.

Before GARDNER, Chief Judge, and WOODROUGH and VOGEL, Circuit Judges.

VOGEL, Circuit Judge.

The sole question involved in this case is whether the appellant, as the surviving corporation in a statutory merger [fol. 52] of seventeen separate corporations, in computing its net income for a taxble period commencing on the date of the merger, is entitled to carry-over and deduct net operating losses sustained by three of the merged corporations in taxable periods ended prior to the date of the merger under the provisions of §§23(s) and 122 (b)(2)(C) of the Internal Revenue Code of 1939 (26 U.S.C. §§23(s), 122 (b) (2)(C) (1952)).

The facts, as found by the district court and as stipulated by the parties, may be summarized as follows:

The appellant, Libson Shops, Inc., is a Missouri corporation with offices in St. Louis, Missouri. It was originally incorporated on January 2, 1946, as Libson Shops Management Corporation to supervise and manage certain other

corporations formed for the purpose of operating stores for the sale of women's wearing apparel. Its articles of incorporation also authorized it to engage in the business of selling apparel. Of the other corporations, ten were also incorporated in Missouri on January 2, 1946, one was incorporated in Missouri on January 8, 1946, and four were incorporated in Illinois on January 2, 1946. An additional corporation, Hampton Libson Shops, Inc., was incorporated in Missouri on May 28, 1948. All of the outstanding stock of each of the corporations was owned directly or indirectly by the same eight individuals and in the same proportions.

On August 1, 1949, pursuant to the laws of Missouri and Illinois, the seventeen separate operating corporations were merged into one, the taxpayer (appellant), and taxpayer's stock was issued in exchange for the stock of the merged corporations. Under the terms of the merger, the name of the taxpayer corporation was changed, the amount and par value of its stock was revised and its business purposes were extended. After the merger, the taxpayer, appellant, [fol. 53] operated the stores which had formerly been operated by the merged corporations.

Prior to the merger, two of the Illinois corporations and one Missouri corporation had sustained net operating losses from the respective businesses.

In the year following the merger, that is the taxable year involved herein, each of the businesses formerly operated by such three corporations continued to sustain a net operating loss.

In its income tax return for the first taxable year after the merger, the taxpayer claimed as a net operating loss carry-over and deduction the net operating losses sustained before the merger by the three corporations above referred to. Such deduction was disallowed by the commissioner and the appellant paid the resulting tax deficiency. It then claimed a refund which was disallowed; whereupon, it instituted the present action. The district court held that the claimed net operating loss deduction was not permissible under the law and sustained the commissioner's disallowance of the deduction. This is an appeal from the district court's action.

The statute involved, insofar as it may be applicable

herein, is as follows: Section 122 (b)(2)(C) Internal Revenue Code of 1939 as amended by Revenue Act of 1951, 65 Stat. 452, effective for taxable years beginning after December 31, 1948:

"(C) Loss for taxable year beginning after December 31, 1947, and before January 1, 1950. *If for any taxable year beginning after December 31, 1947, and before January 1, 1950, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-over for each of the three succeeding taxable years,* except that the carry-over in the case of each such succeeding taxable year (other [fol. 54] than the first succeeding taxable year) shall be the excess, if any, of the amount of such net operating loss over the sum of the net income for each of the intervening years computed—". (Emphasis supplied.)

It is the appellant's position that the surviving corporation in a statutory merger, as distinguished from a new corporation in other kinds of reorganization, is entitled to carry over and deduct losses sustained in prior years by other parties to the reorganization.

Appellant concedes that in *New Colonial Ice Co., Inc.* v. *Helvering, Commissioner of Internal Revenue,* 1934, 292 U. S. 435, the Supreme Court ruled out the conclusion that the benefit of a carry-over extends to *any* successor. It argues that in the *New Colonial Ice* case, the statute involved was worded slightly different than that with which we are here concerned, in that it provided that where "* * * any taxpayer has sustained a net loss * * *" the same shall be deducted from the net income of "the taxpayer" for the succeeding taxable year, whereas the statute here does not repeat the term "taxpayer". That is, the statute does not say if the taxpayer has a loss, such loss shall be a carry-over for succeeding taxable years *of the taxpayer.* It takes the position that the failure to expressly repeat the term "the taxpayer" is significant as suggesting that the statute does not limit the right to the carry-over to the person who sustained the loss. Appellant points out that "the right to the carry-over is stated in the passive voice—the statute does not say that, if the taxpayer has a loss *he* shall be entitled to a loss carry-over; that it says only that such loss *shall be* a carry-over." From this ap-

pellant argues that Congress was not concerned with who sustained the loss but with the fact of the loss itself, and that it intended to confer the tax benefit thereof to anyone who could associate himself with the loss, such as a successor corporation in a corporate reorganization.

[fol. 55] Much is attempted to be made of little. We see no significance in the failure to repeat the term "taxpayer" in the present statute. In providing that if the taxpayer has a loss such loss shall be a carry-over, Congress could only have meant such carry-over was for the benefit of the taxpayer referred to. Had Congress intended that this right to a loss carry-over be transferable to someone other than the original taxpayer, it would have said so. In *New Colonial Ice Co., Inc.* v. *Helvering, Commissioner of Internal Revenue, supra,* the Supreme Court said, at page 440:

"* * * the statutes have disclosed a general purpose to confine allowable losses to the taxpayer sustaining them, *i.e.*, to treat them as personal to him and not transferable to or usable by another.

Obviously, therefore, a taxpayer seeking a deduction must be able to point to an applicable statute and show that he comes within its terms."

The Supreme Court, in the case of *Interstate Transit Lines* v. *Commissioner of Internal Revenue,* 1943, 319 U.S. 590, 593, stated:

"* * * the now familiar rule that an income tax deduction is a matter of legislative grace and that the burden of clearly showing the right to the claimed deduction is on the taxpayer. *New Colonial Ice Co.* v. *Helvering,* 292 U.S. 435, 440; *Deputy* v. *du Pont,* 308 U.S. 488, 493."

In order to obtain credit for the loss carry-over appellant must establish that it is the same "taxpayer" having the net operating loss.

Arriving at the same conclusion, the trial court stated the question herein as follows:

"* * * is the survivor corporation the same as each of the corporations whose tax credit the merged corporation would appropriate?"

[fol. 56] It found that there had been much more than a

"comparatively minor change" (*Stanton Brewery, Inc.* v. *Commissioner of Internal Revenue*, (C.A. 2, 1949) 176 F.2d 573, 575) between the merged corporations and the appellant and concluded:

"We cannot on this record hold plaintiff and any one of the corporations having either of tax credits in issue, is the same corporation.

"There are far too many differences between the new or survival corporation and each of the old corporations that must fail to survive, to find the corporation surviving is for tax credit purposes the same as the corporations that have ceased to exist."

The trial court further stated:

"The effect of a ruling such as plaintiff seeks would be establishing a precedent susceptible of wide-spread abuse. That is if Federal courts are to consider themselves bound by state laws and merger agreements under them in tax matters. Such a rule might result in a different Federal tax status for corporations in each state. * * * The law must operate uniformly. It cannot make fish of one and fowl of another. And so bankrupt corporations with tax credits would find themselves the object of desirable purchase or 'merger' by or with corporations with tax liabilities, in order that after purchase the tax credits could be used to offset taxes due, just as plaintiff would do in this case. Regardless of what the motive or motives for including the corporations with tax credits in the merger, we have no doubt that use of their tax credits was one. The corporations holding the tax credits could not use them, as apparently the stipulation indicates the stores operated by the corporations having tax credits continued to lose money."

Appellant in this case relies principally upon *Stanton Brewery, Inc.* v. *Commissioner of Internal Revenue, supra.* The issue there, as stated by the majority opinion, was:

[fol. 57] "* * * whether or not, after a merger, the resulting corporation is entitled, in determining its adjusted excess profits net income, to carry over the unused excess profits credit of one of its components for the two years preceding the merger."

The John Stanton Brewing and Malting Company had merged with its wholly owned subsidiary, The Stanton Brewery, Inc. Both were New York corporations and the merger was effected under the New York stock corporation law. The John Stanton Brewing and Malting Company, with its name changed to The Stanton Brewery, Inc., was the surviving corporation. In determining its adjusted excess profits net income for 1942, the surviving corporation deducted the unused excess profits credits of its merged subsidiary for 1940 and 1941. The commissioner disallowed the deduction. The statute therein involved was § 710 (c) (3)(B) of the Internal Revenue Code of 1939, which in part provides:

"* * * If * * * the taxpayer has an unused excess profits credit, such unused excess profits credit shall be an unused excess profits credit carry-over for each of the two succeeding taxable years * * *." 26 U.S.C. § 710 (c)(3)(B).

In considering the purpose of the statute, the court said, at page 574:

"As is well known, Congress sought by the excess profits tax, I. R. C. §§ 710-736, 26 U.S.C.A. §§ 710-736—imposed in 1940 and repealed in 1945—to capture for the government the amount of corporate profits of any one year which were excessive in relation to the like receipts during an earlier or base period (normally 1936-1939). But it was considered equitable that lean years should be set off against lush ones to strike some sort of average, and hence we have the device of the 'unused excess profits credit carry-back and carry-over' from one tax year to another."

The court held therein that since the successor corporation became directly liable under the laws of the State of New [fol. 58] York for outstanding debts of the merged corporation, it should be deemed to be the same "taxpayer" as the merged corporation for purposes of applying the carry-over provision. It said that the successor corporation was a "* * * union of component corporations into an all-embracing whole which absorbs the rights and privileges, as well as the obligations, of its constituents," by operation of state law and accordingly was the "taxpayer" presently

obligated to pay their taxes and entitled to their credits under the federal tax law.

The court stated, at page 577:

"Our conclusion that petitioner is entitled to the unused excess profits credit carry-overs of its component corporations seems to us, therefore, the reasonable interpretation of the statutory language. Moreover it seems to us *the one which will carry out the evident statutory purpose, since it accords the privileges of the carry-over provisions to what is essentially a continuing enterprise,* entitled to all their benefits in ameliorating otherwise harsh tax consequences of fluctuating profits or expanding business." (Emphasis supplied.)

In a strongly dissenting opinion in the *Stanton* case, Judge Learned Hand stated, at page 578:

"A statute so intricate and detailed as this leaves little latitude for interpretation. Moreover, I do not think that it is more consistent with any declared purpose that I can find, to extend the privilege of a 'carry-over' to the taxpayer at bar. Indeed, as the decisions cited in my brothers' opinion show, privileges, closely akin in purpose to this, are ordinarily lost by transfers by one corporation to another; and the form of the transfer cannot be important. We have no warrant for supposing that Congress in general regards such credits as parts of a 'universitas juris,' passing, with the chattels, choses in action and the rest, like good-will or trade-marks."

[fol. 59] Without taking issue with the majority's opinion in the *Stanton* case, we point out that it is distinguishable on its facts. The *Stanton* case involved the merger of one operating corporation and a parent holding company. The business carried on after the merger was substantially the same as that which had theretofore been carried on by the merged operating corporation, and without the merger the latter would have been entitled to the claimed carry-over. The majority opinion refers to the fact that the privilege of the carry-over is accorded to what they refer to as "essentially a continuing enterprise".

In the case before us, we do not have "essentially a continuing enterprise". We are concerned with the merger of seventeen corporations, each of them operating an individual enterprise. Sixteen of the corporations operated sixteen individual stores in sixteen different places, four of them in Illinois and the remainder in Missouri. The seventeenth corporation provided supervisory and managerial services for the other sixteen. The appellant here is attempting to pool seventeen separate enterprises and level the ups and downs of their economic fortunes. We can see no distinction (except corporation as opposed to individual) between the situation confronting us in this case and that in which seventeen individuals, each owning and operating a separate and distinct business, trying to pool their resources and liabilities into one ownership and thereby attempting to take credit for the loss carry-overs of three of the individuals whose enterprises had not returned a profit in the years prior to the combined ownership. The rule contended for by appellant would obviously give unfair advantage to corporations over individuals.

Uniformity of administration of tax laws should be assured all taxpayers.

[fol. 60] It is argued that all of the outstanding stock of each of the corporations was owned directly or indirectly by the same individuals and in the same proportions, and that those stockholders have a like interest in the merged corporation, the appellant herein. In other words, we are asked to look behind the corporate fiction to the true owners, the stockholders.

In dealing with a somewhat similar contention, the Supreme Court in *New Colonial Ice Co., Inc.* v. *Helvering*, supra, stated, at page 441:

"Thus the contention that the two corporations were practically the same entity and therefore the same taxpayer has no basis, unless as the petitioner insists, the fact that the stockholders of the two corporations were substantially the same constitutes such a basis.

"As a geneal rule a corporation and its stockholders are deemed separate entities (*Pullman Car Co.* v. *Missouri Pacific Ry. Co.*, 115 U.S. 587, 596-597; *Donnell* v. *Herring-Hall-Marvin Safe Co.*, 208 U.S. 267, 273; *United States* v. *Dela-*

ware, L. & W. R. Co., 238 U.S. 516, 527-529; *Cannon Mfg. Co.* v. *Cudahy Co.*, 267 U.S. 333; *Klein* v. *Board of Supervisors*, 282 U.S. 19, 24.) and this is true in respect of tax problems. (*Klein* v. *Board of Supervisors*, 282 U.S. 19, 24; *Dalton* v. *Bowers*, 287 U.S. 404, 410; *Burnet* v. *Clark*, 287 U.S. 410, 415; *Burnet* v. *Commonwealth Improvement Co.*, 287 U.S. 415, 418-420.)"

Page 437:

"The question presented is—where all the assets and business of an older corporation are taken over by a new corporation, specially organized for the purpose and having substantially the same capital structure, in exchange for a portion of its stock, which is distributed by the older corporation among the latter's stockholders share for share, thereby retiring the old shares, is the new corporation entitled, notwithstanding the change in corporate identity and ownership, to have its taxable income for the succeeding [fol. 61] period computed and determined by deducting from its net income for that period the net losses sustained by the older corporation in the preceding period?"

Page 439:

"The petitioner insists that *the continuity of the business was not broken* by the transfer from the old company to the new; and this may be conceded. But it should be observed that this continuity was accomplished by deliberate elimination of the old company and substitution of the new one. Besides, *the matter of importance here, as will be shown presently, is not continuity of business alone but of ownership and tax liability as well.* Had the transfer from one company to the other been effected by an unconditional sale for cash there would have been continuity of business, but not of ownership or tax liability." (Emphasis supplied.)

"Petitioner also insists that the ultimate parties in interest—stockholders and creditors—were substantially the same after the transfer as before; and this may be conceded. But there is here no effort to tax either creditors or stockholders."

Page 440:

"* * * but the statutes have disclosed a general purpose to confine allowable losses to the taxpayer sustaining them, *i.e.*, to treat them as personal to him and not transferable to or usable by another."

"When §204 (b) is read with the general policy of the statutes in mind, as it should be, we think it cannot be regarded as giving any support to the deduction here claimed. It brings into the statutes an exceptional provision declaring that where for one year 'any taxpayer has sustained a net loss' the same shall be deducted from the net income of 'the taxpayer' for the succeeding taxable year; and, if such loss be in excess of the income for that year, the excess shall be deducted from the net income for the next succeeding taxable year. Its words are plain and free from ambiguity. Taken according to their natural import they mean that the taxpayer who sustained the loss is the one to whom the de- [fol. 62] duction shall be allowed. Had there been a purpose to depart from the general policy in that regard, and to make the right to the deduction transferable or available to others than the taxpayer who sustained the loss, it is but reasonable to believe that purpose would have been clearly expressed."

Appellant herein would avoid the import of the *New Colonial Ice* case by directing attention to the fact that that case did not involve a statutory merger of corporations and the instant case does. Appellant accordingly believes that the *Stanton* case is authority for its contention and that the *New Colonial Ice* case is not in point. As we have previously indicated, however, there is factual difference between the instant case and *Stanton*. That is true as to *New Colonial Ice* as well. It does not, however, detract from the force of the Supreme Court's statements in *New Colonial Ice*, supra, and that "* * * the matter of importance here * * * is not continuity of business alone but ownership and tax liability as well".

In tracing the identity of the "taxpayer", it would appear that the Supreme Court was concerned with both continuity of ownership and continuity of business. In the instant case we have seventeen separate businesses now

merged into one. We are of the opinion that this case lacks both of the essential elements necessary to establishing the appellant as the "taxpayer" entitled to the deduction. There is here neither continuity of ownership nor continuity of business.

While we do not consider it as a logical argument against the appellant's position and is, after a fashion, arguing backwards, it is nevertheless pointed out that to allow the credit here would produce a most unusual result. It would mean that *the merger* of these corporations *and the merger alone* would be responsible for the appellant obtaining the credit sought, for if the three corporations sustaining the [fol. 63] loss had not merged they would not have been able to take credit for the loss carry-over as they continued to sustain losses. Thus the appellant here is seeking solely by virtue of the merger of the corporations to obtain a benefit which would not have been available to the individual corporations themselves. The income against which appellant seeks to offset the loss did not come from the same business enterprises which gave rise to the loss. Congress intended by the statute involved to level out the ups and downs of *individual business enterprises, not combinations thereof* owned by different taxpayers.

Since this case was argued, there has been called to our attention a case of the United States Court of Appeals for the Ninth Circuit, *E. & J. Gallo Winery, a corp., Petitioner,* v. *Commissioner of Internal Revenue,* No. 14,180, decided November 9, 1955. That case involved a statutory merger of two corporations under the laws of California. The facts disclosed in the opinion do not indicate whether or not there was involved a continuing enterprise, that is, "continuity of business". The court therein distinguished the case before it from the *New Colonial Ice* case on the ground that in the *Gallo* case there was a true statutory merger and in the *New Colonial Ice* case "there was nothing resembling a merger". Relying strongly on the *Stanton* case, the court said, page 8:

"We hold and *Stanton* held, that the surviving corporation is the 'taxpayer', who may use the unused excess profits tax credit of the former corporation."

Apparently the *Gallo* and *Stanton* cases stand on the same footing. Nevertheless, insofar as it can be said that they are parallel with the instant case, we must conclude that they are not persuasive.

[fol. 64] Appellant also cites in support of its contention *Helvering, Commissioner of Internal Revenue* v. *Metropolitan Edison Co.*, 1939, 306 U.S. 522. In that case, the court stated, at page 523:

"These cases present the question whether, under the Revenue Acts of 1926 and 1928, a Pennsylvania corporation may deduct unamortized bond discount and expense in connection with redemption of the bonds of a subsidiary, all of whose assets it had previously acquired pursuant to local law."

That case holds that where a transferee corporation becomes liable for the debts of the transferor because of a merger, it may deduct losses or expenses arising out of the assumed debts, such as unamortized discount on bonds issued by the transferor. That is not the situation confronting the court in this case. The appellant here is not attempting to deduct a post-merger expense or loss of its own arising out of the assumption of the debts of the merged corporations, but to carry over and deduct pre-merger operating losses of three of the merged corporations. Furthermore, in the *Metropolitan Edison* case, the Supreme Court stated, at page 529:

"It is important to note, however, that amongst the liabilities assumed were bonds on which the parent company was already liable as guarantor."

We do not consider *Metropolitan Edison* as authority for appellant's contention.

It is significant, in drawing fact distinctions between the case at bar and those relied on by the appellant, that the merged corporations in the present instance were not all of the same state. Of the three corporations which sustained losses which the appellant is attempting to take as net operating loss carry-overs, two of such corporations were from the State of Illinois and one from the State of Missouri. We find it particularly difficult to say that two legal entities

[fol. 65] brought into existence by the laws of the State of Illinois are now identical with and have become a creature brought into existence by the laws of Missouri.

In *Newmarket Mfg. Co.* v. *United States,* (D. C. Mass. 1955) 130 F. Supp. 706, the court had before it a situation almost on all fours with that confronting this court. There a Massachusetts corporation had caused the organization of a Delaware corporation. Subsequently the Massachusetts corporation was merged into and consoliated with the Delaware corporation. The consolidated corporation became liable for all the obligations of the Massachusetts corporation. It had the same business as the Massachusetts corporation, the same officers, the same stockholders and the same outstanding stock certificates. After the merger, the Massachusetts corporation ceased to exist as a separate corporation. The question there was whether, under § 122 of the Revenue Code of 1939, as amended, 26 U.S.C.A. § 122, " * * * a net operating loss incurred by the consolidated corporation in its fiscal year December 1, 1951, to November 30, 1952 (that is, after the merger) may be carried back to be deducted, from the income tax liability attributable to the separate operations of the Massachusetts corporation for the period * * *" before the merger.

In a well-reasoned opinion, the court therein stated, at page 707:

"Where identity between the merging corporations and the consolidated corporation is recognized by local law, then, so the argument runs, the federal tax law accepts the identity. Indeed, it is said, such identity has been recognized in connection with carry-back provisions, *Moldit, Inc.* v. *Jarecki*, D.C. N.D. Ill., Aug. 13, 1953, (P. H. par. 72, 681), as well as in connection with unused excess profits credits. *Stanton Brewery, Inc.,* v. *Commissioner,* 2 Cir., 176 F. 2d 573.

There are two fundamental vices in this argument. First is the erroneous assumption that the federal tax law deter-[fol. 66] mines the identity of the taxpayer under federal law by reference to state rules of law or private agreements governing mergers. However, the question whether the same taxpayer is involved in two different accounting periods under federal law is to be decided exclusively by federal

tax law. Second is the fallacious proposition that the Delaware corporation is the same person as the Massachusetts corporation merely having, as plaintiff's brief contends, another domicile and another name. However, even if the situation at bar involved two corporations chartered by the same state it would not be true that the identity of one corporation survives when merged with another."

The court held:

"* * * that under § 122 of the Internal Revenue Code of 1939 a consolidated corporation cannot carry back its losses in one year to reduce the tax liability incurred in an earlier year due to operations of one of its constituent corporations."

When Congress passed the statute here involved it was concerned with eliminating inequality, taxwise, between a business with alternating profit and loss as compared with a business with stable profits. It allowed the lean years of a business with alternating profit and loss to be set-off against the good years so as to strike an equitable tax liability as compared to a business having steady profits. We find nothing to suggest that Congress intended that a number of individual enterprises could pool their economic ups and downs and thus level off their tax burden between them. Congress was concerned with the economic fortunes of individual taxpayers, not combinations thereof.

Affirmed.

[fol. 67] UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT—September Term, 1955

No. 15397

LIBSON SHOPS, INC., Appellant,

vs.

GUSTAVE F. KOEHLER, District Director of Internal Revenue

Appeal from the United States District Court for the Eastern District of Missouri.

JUDGMENT—January 19, 1956

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

January 19, 1956.

[fol. 68] Petition for rehearing covering 7 pages filed, omitted from this print. It was denied, and nothing more by order.

[fol. 69] UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Title Omitted]

ORDER DENYING PETITION OF APPELLANT FOR REHEARING—February 16, 1956

Appeal from the United States District Court for the Eastern District of Missouri.

Petition of appellant for a rehearing filed in this cause has been considered, and It is now here Ordered by this Court that the said petition, be and it is hereby, denied.

February 16, 1956.

[fol. 70] ORDER STAYING ISSUANCE OF MANDATE (Omitted in Printing)

[fol. 71] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 72] SUPREME COURT OF THE UNITED STATES.

[Title Omitted]

ORDER ALLOWING CERTIORARI—Filed June 4, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(774-0)